

MICHAEL F. HERTZ  
Deputy Assistant Attorney General  
MELINDA HAAG  
United States Attorney  
ARTHUR R. GOLDBERG  
Assistant Branch Director  
CHRISTOPHER R. HALL  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch

P.O. Box 883  
Washington, D.C. 20044  
Telephone: (202) 514-4778  
Facsimile: (202) 616-8470  
Email: [Christopher.Hall@usdoj.gov](mailto:Christopher.Hall@usdoj.gov)

Attorneys for Defendants

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

KAREN GOLINSKI

Plaintiff,

v.

THE UNITED STATES OFFICE OF  
PERSONNEL MANAGEMENT, et al.

Defendants.

No. C 3:10-00257-JSW

**DEFENDANTS' MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT**

Date: July 29, 2011  
Time: 9 a.m.  
Place: Courtroom 11, 19<sup>th</sup> Floor  
U.S. Courthouse  
450 Golden Gate Ave.  
San Francisco, CA 94102

Insofar as Plaintiff seeks to assert a statutory claim as to the language of the Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901 et seq. ("FEHBA") – and it is not clear that she does – such a claim must be dismissed as a matter of law.<sup>1</sup>

<sup>1</sup> To the extent Plaintiff in fact asserts such a claim, she does so as an alternative to her claim that the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), violates the Equal Protection Clause of the Fifth Amendment. See 2d Am. Compl., ¶¶ 71, 72.

1 “An enrollment [in the Federal Employees Health Benefits Program (“FEHBP”)] for self  
 2 and family includes all family members who are eligible to be covered by the enrollment.” 5  
 3 C.F.R. § 890.302(a)(1) (emphasis added). A “member of family” is defined as either “the spouse  
 4 of an employee or annuitant [or] an unmarried dependent child under 22 years of age . . . .” 5  
 5 U.S.C. § 8901(5) (emphasis added). Because DOMA limits the term “spouse” for purposes of  
 6 federal law to “a person of the opposite sex who is a husband or wife,” 1 U.S.C. § 7, the FEHBA  
 7 itself does not permit the enrollment of Plaintiff’s wife as a statutory matter.

8 Notwithstanding this statutory language, Plaintiff asserts in ¶ 71 of her First Claim for  
 9 Relief that the federal government – through the Office of Personnel Management (“OPM”) –  
 10 has authority to extend FEHBP benefits to same-sex spouses, and that OPM’s understanding to  
 11 the contrary “is not mandated by DOMA . . . but rather reflects an improper and overly narrow  
 12 construction of the permissible bounds of the federal government’s authority to extend coverage  
 13 to family members.” 2d Am. Compl. ¶ 71. In Plaintiff’s view, the terms “family members” and  
 14 “member of family” in the FEHBA “set general guidelines and minimum requirements of  
 15 coverage availability but do not establish absolute ceilings or outer boundaries of coverage.” Id.

16 Plaintiff’s argument is incorrect. Congress’s specific definition of “member of family”  
 17 must be understood as encompassing the universe of persons who are eligible under that rubric.  
 18 Where Congress “explicitly enumerates,” the enumeration is usually construed as exclusive; this  
 19 concept is so well established as to be represented by a maxim of statutory construction,  
 20 “expressio unius est exclusio alterius” (expression of one thing is the exclusion of the other). See  
 21 TRW Inc. v. Andrews, 534 U.S. 19, 28-29 (2001). Further bolstering this textual reading,  
 22 Congress amended the FEHBA in 1984 to provide specific coverage for the “former spouse” of  
 23 an employee or annuitant whose marriage to the employee or annuitant has been dissolved by  
 24 divorce or annulment. See 5 U.S.C. §§ 8901(10), 8905(c); see also Pub. Law No. 98-615, § 3, 98  
 25 Stat. 3195, 3202 (1984); H.R. Report No. 98-1054 at 12, reprinted in 1984 U.S.C.C.A.N. 5540,  
 26 5543 (observing that amendment was necessary because “[a]fter divorce, the former spouse no  
 27 longer has access to health insurance coverage provided under the Federal employees health  
 28 benefits program”).

1 Other tribunals have reached the same conclusion as to the correct construction of the  
 2 FEHBA. In Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010), the  
 3 district court addressed an identical statutory claim and held that “[i]n the face of such strikingly  
 4 unambiguous statutory language to the contrary, this court cannot plausibly interpret the FEHB  
 5 statute to confer on OPM the discretion to provide health benefits to same-sex couples,  
 6 notwithstanding DOMA.” Id. at 385-86. While it upheld OPM’s construction of the FEHBA,  
 7 the district court in Gill ultimately held Section 3 of DOMA to be unconstitutional under the  
 8 Equal Protection Clause. Id. at 386-97. And in In re. Levenson, 587 F.3d 925 (9<sup>th</sup> Cir. EDR  
 9 Panel 2009), a case bearing procedural similarities to this, Ninth Circuit Judge Reinhardt, acting  
 10 in his administrative capacity, reached the same outcome. Judge Reinhardt rejected the  
 11 plaintiff’s statutory claim, concluding that “when the FEHBA . . . provisions defining family  
 12 members are read in light of the limitation imposed by DOMA, those provisions include only  
 13 opposite-sex spouses.” Id. at 930-31 (emphasis in original); but see In re. Golinski, 587 F.3d 901  
 14 (9<sup>th</sup> Cir. EDR Panel 2009). As to the plaintiff’s constitutional claim, Judge Reinhardt found that  
 15 DOMA violated the Due Process Clause. Id. at 931-34.

### 16 CONCLUSION

17 To the extent Plaintiff asserts a statutory claim under the FEHBA as part of the First  
 18 Claim for Relief of her Second Amended Complaint, ¶¶ 63 to 73, such claim must be dismissed  
 19 as a matter of law.  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 Dated: June 3, 2011

2 Respectfully Submitted,

3 MICHAEL F. HERTZ  
4 Deputy Assistant Attorney General

5 MELINDA HAAG  
6 United States Attorney

7 ARTHUR R. GOLDBERG  
8 Assistant Branch Director

9 /s/ Christopher R. Hall  
10 CHRISTOPHER R. HALL  
11 D.C. Bar No. 468827  
12 Trial Attorney  
13 U.S. Department of Justice  
14 Civil Division, Federal Programs Branch  
15 P.O. Box 883  
16 Washington, D.C. 20044  
17 (202) 514-4778 (telephone)  
18 (202) 616-8470 (fax)

19 Attorneys for Defendants